

OCA FILE

Leg

9 March 1989  
OCA 0790-89

MEMORANDUM FOR: Chief, Administrative Law Division/OGC

FROM: [redacted] Legislation Division  
Office of Congressional Affairs

STAT

SUBJECT: Compromise Whistleblower Bill, S. 20

1. Attached for your review and comment is a copy of the revised version of the Whistleblower Protection Act of 1989. This version reflects negotiations with the Administration concerning the version passed by the Congress last year which was pocket vetoed by the President. It is expected that the bill may come to the Senate floor next week and be passed quickly.

2. Should you have any concerns with the bill with respect to protection of the Agency's equities, I ask that you contact me immediately. You may telephone me on [redacted]

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Attachment

OCA/LEG, [redacted] 9 Mar 89

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Distribution:

Orig - addressee

1 - C/ICA/OGC (w/att.)

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STAT

AMENDMENT NO. \_\_\_\_\_

Calendar No. \_\_\_\_\_

Purpose: To amend title 5, United States Code, to strengthen the protections available to Federal employees against prohibited personnel practices, and for other purposes.

IN THE SENATE OF THE UNITED STATES—101st Cong., 1st Sess.

**S. 20**

To amend title 5, United States Code, to strengthen the protections available to Federal employees against prohibited personnel practices, and for other purposes.

Referred to the Committee on \_\_\_\_\_  
and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. LEVIN (for himself, Mr. GRASSLEY and Mr. PRYOR)

Viz:

1 On page 3, line 12, strike out all through line 23 on  
2 page 14 and insert in lieu thereof:

3 (a) MERIT SYSTEMS PROTECTION BOARD.—Chapter 12  
4 of title 5, United States Code is amended—

5 (1) in section 1201 in the second sentence by  
6 striking out “Chairman and”;

7 (2) in the heading for section 1202 by striking  
8 out the comma and inserting in lieu thereof a semi-  
9 colon;

1 (3) in section 1202(b)—

2 (A) in the first sentence by striking out  
3 “his” and inserting in lieu thereof “the mem-  
4 ber’s”; and

5 (B) in the second sentence by striking out  
6 “of this title”;

7 (4) in section 1203(a) in the first sentence by  
8 striking out the comma after “time”;

9 (5) in section 1203(c) by striking out “the  
10 Chairman and Vice Chairman” and inserting in lieu  
11 thereof “the Chairman and the Vice Chairman”;

12 (6) by redesignating section 1204 as section  
13 1211(b) and inserting such subsection after section  
14 1211(a) (as added in paragraph (11) of this subsec-  
15 tion);

16 (7) by redesignating section 1205 as section  
17 1204, and amending such redesignated section—

18 (A) by striking out “and Special Counsel”,  
19 “the Special Counsel,” and “of this section”  
20 each place such terms appear;

21 (B) by striking out “subpena” and “sub-  
22 penaed” each place such terms appear and in-  
23 serting in lieu thereof “subpoena” and “sub-  
24 poenaed”, respectively;

1 (C) in subsection (a)(4) by striking out  
2 “(e)” and inserting in lieu thereof “(f)”;

3 (D) by amending subsection (b)(2) to read  
4 as follows:

5 “(2) Any member of the Board, any administra-  
6 tive law judge appointed by the Board under section  
7 3105, and any employee of the Board designated by  
8 the Board may, with respect to any individual—

9 “(A) issue subpoenas requiring the attend-  
10 ance and presentation of testimony of any such  
11 individual, and the production of documentary  
12 or other evidence from any place in the United  
13 States, any territory or possession of the United  
14 States, the Commonwealth of Puerto Rico, or  
15 the District of Columbia; and

16 “(B) order the taking of depositions from,  
17 and responses to written interrogatories by, any  
18 such individual.”;

19 (E) in subsection (c) in the first sentence—

20 (i) by striking out “(b)(2) of this sec-  
21 tion,” and inserting in lieu thereof  
22 “(b)(2)(A) or section 1214(b), upon appli-  
23 cation by the Board,”; and

24 (ii) by striking out “judicial”;

1 (F) by redesignating subsections (d)  
2 through (k) as subsections (e) through (l), re-  
3 spectively, and inserting after subsection (c) the  
4 following new subsection:

5 “(d) A subpoena referred to in subsection (b)(2)(A)  
6 may, in the case of any individual outside the territorial  
7 jurisdiction of any court of the United States, be served in  
8 such manner as the Federal Rules of Civil Procedure pre-  
9 scribe for service of a subpoena in a foreign country. To  
10 the extent that the courts of the United States can assert  
11 jurisdiction over such individual, the United States District  
12 Court for the District of Columbia shall have the same ju-  
13 risdiction to take any action respecting compliance under  
14 this subsection by such individual that such court would  
15 have if such individual were personally within the jurisdic-  
16 tion of such court.”;

17 (G) in subsection (e) (as redesignated by  
18 subparagraph (F) of this paragraph)—

19 (i) in paragraph (1)—

20 (I) by redesignating such para-  
21 graph as subparagraph (A) of para-  
22 graph (1); and

23 (II) by inserting at the end there-  
24 of the following new subparagraph:

1           “(B)(i) The Merit Systems Protection  
2 Board may, during an investigation by the  
3 Office of Special Counsel or during the penden-  
4 cy of any proceeding before the Board, issue  
5 any order which may be necessary to protect a  
6 witness or other individual from harassment,  
7 except that an agency (other than the Office of  
8 Special Counsel) may not request any such  
9 order with regard to an investigation by the  
10 Office of Special Counsel from the Board  
11 during such investigation.

12           “(ii) An order issued under this subpara-  
13 graph may be enforced in the same manner as  
14 provided for under paragraph (2) with respect to  
15 any order under subsection (a)(2).”;

16           (ii) in paragraph (2)—

17           (I) by redesignating such para-  
18 graph as subparagraph (A) of para-  
19 graph (2) and striking out “of this  
20 section” in the first sentence therein;  
21 and

22           (II) by inserting at the end there-  
23 of the following new subparagraph  
24 (B):

1           “(B) The Board shall prescribe regulations  
2           under which any employee who is aggrieved by  
3           the failure of any other employee to comply  
4           with an order of the Board may petition the  
5           Board to exercise its authority under subpara-  
6           graph (A).”; and

7                       (iii) in paragraph (3) by inserting “of  
8                       Personnel Management” after “Office”;

9                       (H) in subsection (f) (as redesignated by  
10           subparagraph (F) of this paragraph)—

11                      (i) in paragraph (1) in the first sen-  
12                      tence by inserting “of the Office of Per-  
13                      sonnel Management” after “Director”,  
14                      and by striking out “of this title”;

15                      (ii) in paragraph (2)—

16                      (I) in the first sentence by insert-  
17                      ing a comma after “subsection”;

18                      (II) in subparagraph (A) by strik-  
19                      ing out “of this title”; and

20                      (III) in subparagraph (B) by strik-  
21                      ing out “of this title”; and

22                      (iii) in paragraph (3)—

23                      (I) in subparagraph (A) by strik-  
24                      ing out “(A)”;

1 (II) by striking out subparagraph  
2 (B); and

3 (III) by redesignating subpara-  
4 graph (C) and clauses (i) and (ii)  
5 therein as paragraph (4) and subpara-  
6 graphs (A) and (B), respectively; and

7 (I) in subsection (j) (as redesignated by  
8 subparagraph (F) of this paragraph) in the  
9 second sentence by striking out "of this title"  
10 after "chapter 33";

11 (8) by striking out sections 1206 through 1208;

12 (9) by redesignating section 1209(a) as section  
13 1205, and inserting before such section the following  
14 section heading:

15 **"§ 1205. Transmittal of information to Congress";**

16 (10) by redesignating section 1209(b) as section  
17 1206, and inserting before such section the following  
18 section heading:

19 **"§ 1206. Annual report";**

20 (11) by inserting after section 1206 (as redesign-  
21 ated in paragraph (10) of this subsection) the fol-  
22 lowing:



1 "SUBCHAPTER II—OFFICE OF SPECIAL COUNSEL

2 "§ 1211. Establishment

3 "(a) There is established the Office of Special Coun-  
4 sel, which shall be headed by the Special Counsel. The  
5 Office shall have an official seal which shall be judicially  
6 noticed. The Office shall have its principal office in the  
7 District of Columbia and shall have field offices in other  
8 appropriate locations.";

9 (12) by amending section 1211(b) (as redesign-  
10 nated and inserted by paragraph (6) of this subsec-  
11 tion)—

12 (A) in the first sentence by striking out "of  
13 the Merit Systems Protection Board" and  
14 "from attorneys";

15 (B) by striking the second sentence and in-  
16 serting in lieu thereof "The Special Counsel  
17 shall be an attorney who, by demonstrated abili-  
18 ty, background, training, or experience, is espe-  
19 cially qualified to carry out the functions of the  
20 position. A Special Counsel appointed to fill a  
21 vacancy occurring before the end of a term of  
22 office of the Special Counsel's predecessor  
23 serves for the remainder of the term."; and

24 (C) by adding at the end thereof "The Spe-  
25 cial Counsel may not hold another office or po-

1           sition in the Government of the United States,  
2           except as otherwise provided by law or at the  
3           direction of the President.”; and  
4           (13) inserting after section 1211 the following:

5           On page 16, line 15, strike out all after the comma  
6 through line 22 and insert in lieu thereof “the Special  
7 Counsel may apply to the Merit Systems Protection Board  
8 to enforce the subpoena in court pursuant to section  
9 1204(c).”.

10          On page 17, strike out lines 9 through 15.

11          On page 17, strike out “(d)” and insert in lieu thereof  
12 “(c)”.

13          On page 17, line 21, strike out “(A)”.

14          On page 17, line 24, beginning with the comma,  
15 strike out all through line 25 and insert in lieu thereof a  
16 period.

17          On page 18, strike out lines 1 through 20.

1 On page 26, beginning with line 20, strike out all  
2 through line 2 on page 27 and insert in lieu thereof the  
3 following:

4 "Special Counsel determines that the disclosure of the in-  
5 dividual's identity is necessary because of an imminent  
6 danger to public health or safety or imminent violation of  
7 any criminal law."

8 On page 27, line 16, insert "the National Security  
9 Advisor," before "the Permanent".

10 On page 27, line 18, insert a comma before "and the  
11 Select".

12 On page 34, line 6, insert "contributing" before  
13 "factor".

14 On page 34, line 13, beginning with "obtained"  
15 strike out all through line 17, and insert in lieu thereof  
16 "obtained by any employee, former employee, or appli-  
17 cant for employment adversely affected by such order or  
18 decision."

1 On page 35, line 12, insert after "Special Counsel" a  
2 comma and "after consultation with the Attorney Gener-  
3 al,".

4 On page 40, strike out all beginning with line 18  
5 through line 2 on page 41 and insert in lieu thereof :

6 "§ 1217. Transmittal of information to Congress

7 "The Special Counsel or any employee of the Special  
8 Counsel designated by the Special Counsel, shall transmit  
9 to the Congress on the request of any committee or sub-  
10 committee thereof, by report, testimony, or otherwise, in-  
11 formation and the Special Counsel's views on functions,  
12 responsibilities, or other matters relating to the Office.  
13 Such information shall be transmitted concurrently to the  
14 President and any other appropriate agency in the execu-  
15 tive branch.

16 On page 44, line 14, insert "contributing" before  
17 "factor".

18 On page 45, strike out lines 4 through 9 and insert in  
19 lieu thereof:

20 "(g)(1) If an employee, former employee, or appli-  
21 cant for employment is the prevailing party before the  
22 Merit Systems Protection Board, and the decision is based

1 on a finding of a prohibited personnel practice, the agency  
2 involved shall be liable to the employee, former employee,  
3 or applicant for reasonable attorney's fees and any other  
4 reasonable costs incurred.

5       “(2) If an employee, former employee, or applicant  
6 for employment is the prevailing party in an appeal from  
7 the Merit Systems Protection Board, the agency involved  
8 shall be liable to the employee, former employee, or appli-  
9 cant for reasonable attorney's fees and any other reasona-  
10 ble costs incurred, regardless of the basis of the decision.

11       On page 46, beginning with line 8, strike out all  
12 before line 11 and insert in lieu thereof:

13       (b) CONFORMING AMENDMENTS.—(1) The table of  
14 chapters for part II of title 5, United States Code, is  
15 amended by striking the item relating to chapter 12 and  
16 inserting in lieu thereof the following:

      “12. Merit Systems Protection Board, Office of Special Counsel, and  
          Individual Right of Action ..... 1201”.

17       (2) The heading for chapter 12 of title 5, United  
18 States Code, is amended to read as follows:

19       **“CHAPTER 12—MERIT SYSTEMS PROTECTION**  
20       **BOARD, OFFICE OF SPECIAL COUNSEL, AND**  
21       **EMPLOYEE RIGHT OF ACTION”.**

22       (3) The table of sections for chapter 12 of title 5,  
23 United States Code, is amended to read as follows:

"Sec. 1201. Appointment of members of the Merit Systems Protection Board.  
 "Sec. 1202. Term of office; filling vacancies; removal.  
 "Sec. 1203. Chairman; Vice Chairman.  
 "Sec. 1204. Powers and functions of the Merit Systems Protection Board.  
 "Sec. 1205. Transmittal of information to Congress.  
 "Sec. 1206. Annual report.

- “Sec. 1211. Establishment.
- “Sec. 1212. Powers and functions of the Office of Special Counsel.
- “Sec. 1213. Provisions relating to disclosures of violations of law, mismanagement, and certain other matters.
- “Sec. 1214. Investigation of prohibited personnel practices; corrective action.
- “Sec. 1215. Disciplinary action.
- “Sec. 1216. Other matters within the jurisdiction of the Office of Special Counsel.
- “Sec. 1217. Transmittal of information to Congress.
- “Sec. 1218. Annual report.
- “Sec. 1219. Public information.

“Sec. 1221. Individual right of action in certain reprisal cases.  
“Sec. 1222. Availability of other remedies.”.

4 "SUBCHAPTER I—MERIT SYSTEMS PROTECTION  
5 BOARD".

6 On page 52, line 21, strike out "and 1993,  
7 \$20,000,000" and insert in lieu thereof "1993, and 1994,  
8 such sums as necessary".

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S.L.C.

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- 1 On page 53, lines 1 and 2, strike out "and 1991,
- 2 \$5,000,000" and insert in lieu thereof "1991 and 1992,
- 3 such sums as necessary".